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IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

CRYSTAL M. FERGUSON, *et al.*,

Petitioners,

—v.—

CITY OF CHARLESTON, SOUTH CAROLINA, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION; NOW LEGAL DEFENSE AND EDUCATION FUND; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION, INC.; AFRICAN-AMERICAN WOMEN EVOLVING; AMERICANS FOR DEMOCRATIC ACTION, INC.; CENTER FOR CONSTITUTIONAL RIGHTS; CENTER FOR WOMEN POLICY STUDIES; CHICAGO ABORTION FUND; CHOICE; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; HAWAII STATE COALITION AGAINST DOMESTIC VIOLENCE; HAWAI'I WOMEN LAWYERS; IOWA COALITION AGAINST DOMESTIC VIOLENCE; MEDICAL STUDENTS FOR CHOICE; NATIONAL ASSOCIATION OF WOMEN LAWYERS; NATIONAL CENTER FOR PRO-CHOICE MAJORITY; NATIONAL NETWORK OF ABORTION FUNDS; NATIONAL SOCIETY OF GENETIC COUNSELORS; NORTHWEST WOMEN'S LAW CENTER; SOUTH CAROLINA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT; SOUTH DAKOTA COALITION AGAINST DOMESTIC VIOLENCE AND SEXUAL ASSAULT; WOMEN'S LAW CENTER OF MARYLAND, INC.; AND WIDER OPPORTUNITIES FOR WOMEN, IN SUPPORT OF PETITIONERS

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Pursuant to Rule 37.2(b), the organizations listed above respectfully move this Court for leave to file the attached brief *amicus curiae* in support of petitioners. Separate statements of interest follow. Collectively, however, *amici* have a long history in defense of women's rights. Petitioners have granted consent, but respondents have refused to consent.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution, and has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. The ACLU of South Carolina is its statewide affiliate. This case raises important questions about the right of pregnant women to be treated as fully autonomous beings entitled to equal status under the Constitution. That is an issue that the ACLU has addressed in numerous contexts over the years through the efforts, among others, of our Women's Rights Project and our Reproductive Freedom Project. The ACLU has also been deeply involved in the legal debate over suspicionless drug testing, more generally. The proper resolution of this case is therefore a matter of substantial concern to the ACLU and its members.

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to combat gender-based discrimination and promote equal rights. A major goal of NOW LDEF's work is to secure reproductive rights for all women. To this end, NOW LDEF has litigated numerous cases involving clinic violence and efforts to protect safe access to reproductive health services.

The National Organization for Women Foundation is a 501(c)(3) organization devoted to furthering women's rights

through education and litigation. NOW Foundation is affiliated with the National Organization for Women, the largest feminist organization in the United States, with a contributing membership of over 500,000 women and men and more than 500 chapters in all 50 states and the District of Columbia. Since its inception in 1986, a major goal of NOW Foundation has been to ensure full equality for women, including reproductive freedom and fair treatment in health care services. In furtherance of that goal, NOW Foundation has supported related litigation and legislation, and has an ongoing interest in full health care for pregnant women. Policies such as those at issue here infringe on the constitutional rights of pregnant women.

Founded in October 1996, African-American Women Evolving's (AAWE) mission is to examine and draw the connections between social justice and basic human rights issues (*i.e.*, violence against women, substance abuse, HIV/AIDS, economic development and sustainability, etc.) that directly and indirectly impact the ability of women of color to exercise complete autonomy over their lives and bodies. AAWE supports the protection of a woman's right to privacy and reproductive autonomy. AAWE further believes that a ruling permitting unlimited restrictions on pregnant women's privacy and autonomy could lead to the diminution of constitutional rights for nonpregnant women and men, and have an even harsher impact on women of color, who historically have not had the freedom to choose and have an even harsher impact on access to the information and resources to exercise their choices.

Americans for Democratic Action, Inc. (ADA) is an independent, liberal, political organization, founded in 1947 by Eleanor Roosevelt, Joseph Rauh, and others, dedicated to promoting individual liberty and economic justice. ADA publishes a weekly legislative newsletter for liberal activists, a quarterly newsletter, special reports, including an annual voting record report that ranks Members of Congress ac-

cording to a liberal quotient based on a full spectrum of domestic and international policy issues. In addition to its legislative advocacy, ADA maintains a political action committee to support liberal candidates for Congress. ADA also engages in independent campaign activity in support of presidential candidates.

The Center for Constitutional Rights (the Center) is a national not-for-profit legal, educational, and advocacy organization dedicated to advancing and protecting the rights guaranteed by the United States Constitution and the Universal Declaration of Human Rights. Founded in 1966, the Center undertakes litigation on behalf of women and women's rights organizations on a wide range of issues, and assists in the development of legislative policy at the municipal, state and federal levels of government. The Center's current women's rights litigation and education docket focuses primarily on issues surrounding the severe repression of women's choices regarding sexuality, reproduction and childrearing, discrimination and unfair treatment in employment, and violence against women in the home and workplace. The issues before the Court have significant implications for the reproductive freedoms of women, particularly indigent women of color, and are therefore of critical importance to the Center's mandate.

Founded in 1972, the Center for Women Policy Studies (the Center) is an independent, national, multiethnic and multicultural feminist policy research and advocacy institution. The Center is a founding member and serves on the steering committee of the National Coalition for Effective Drug Policy and co-chairs the Coalition's Women and Families Drug Policy Committee. Since 1989, the Center has addressed attempts to define a legal status for the fetus and create an artificial "maternal-fetal conflict" in both HIV/AIDS and drug policies. We currently are working with a network of state legislators to promote public health rather than punitive approaches to address the needs of pregnant

women in the context of substance abuse. The Court's decision in this case will have a significant impact on legislators' ability to enact comprehensive approaches that increase pregnant women's access to affordable health care, protect women's reproductive choices, and encourage women to seek prenatal care -- the single most important factor influencing a healthy pregnancy outcome.

The Chicago Abortion Fund (CAF) was founded in October 1985 by health-care providers and members of Chicago's pro-choice community to provide low-income women with access to safe, affordable abortion services. CAF's mission is to overturn economic barriers to reproductive choice. CAF further works to increase the awareness of policymakers and the public about low-income women's inability to access the full range of reproductive health care, including safe abortion. Through direct service and education/advocacy, CAF helps low-income women in obtaining safe abortion services by providing clinic referrals, negotiated discounts and financial assistance. In both its direct service and education/advocacy activities, CAF confronts the social and economic barriers that make it virtually impossible for low-income women, disproportionately women of color, to achieve reproductive autonomy.

CHOICE is a nonprofit agency dedicated to advocacy and education on issues of reproductive health, family planning, HIV/AIDS, and children's health. Founded in 1971, CHOICE currently serves over 36,000 people annually, primarily low-income women and teens in the Philadelphia area. CHOICE recognizes the detrimental effect of the drug-testing policy on women's and children's health. If women fear that their drug use will be discovered by law enforcement officials, they will be less likely to seek health services. Fewer pregnant women accessing prenatal care threatens a potential increase in maternal and infant mortality; greater high-risk deliveries and critical neonatal condi-

tions; and escalating public cost in financial and human resources to cope with preventable health crises.

The Connecticut Women's Education and Legal Fund (CWEALF) is a nonprofit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was founded in 1973 and has a membership of over 1,000 individuals and organizations. CWEALF has spent much of its history defending the rights of pregnant women in the courts, workplaces and in their private lives. We have participated in landmark cases on termination of parental rights based on prenatal drug use and have worked with the state's correctional institutions to promote drug treatment for female inmates. CWEALF believes that a ruling which upholds the diminished rights of pregnant women sets a precedent for prohibiting a wide range of activities for pregnant women. The drug-testing policy at issue in *Ferguson v. City of Charleston* demonstrates that pregnant women are impermissibly being subjected to invasions of privacy and autonomy.

The Hawaii State Coalition Against Domestic Violence (HSCADV) is a not-for-profit statewide coalition of twenty domestic violence programs, working collaboratively to affect public policy and establish a coordinated and consistent response for the safety and protection of battered women. Our goals include public recognition of domestic violence as a pervasive societal problem detrimental to all members of society and the obliteration of racism, sexism, and homophobia which contribute to domestic violence.

Hawai'i Women Lawyers (HWL) is a nonprofit organization devoted to the advancement of the civil rights and social welfare of Hawai'i's citizens -- particularly its women and children. Its membership consists of over 200 lawyers licensed to practice in the State of Hawai'i, together with auxiliary lay and unlicensed members. Throughout its 23-

year history HWL has been a strong supporter of the right to choose. In its efforts to preserve and extend the civil rights of Hawai'i's citizens, HWL has lobbied strenuously for many years in our State Legislature and has filed numerous *amicus* briefs in appellate courts, primarily in Hawai'i and the Ninth Circuit.

The Iowa Coalition Against Domestic Violence (ICADV) is a nonprofit organization, incorporated in the state of Iowa in 1985. ICADV provides educational and technical assistance to domestic violence programs across Iowa, and also acts on a statewide level to promote public policy and legislative issues on behalf of battered women and their children. ICADV's purpose is to eliminate personal and institutional violence against women through support to programs providing safety and services to battered women and their children. Recognizing that unequal power contributes to violence against women, ICADV advocates for social change, legal and judicial reform, and the end to all oppression.

Medical Students for Choice represents over 5,000 medical students and residents dedicated to ensuring that women receive comprehensive reproductive health care, including abortion. One of the greatest obstacles to safe, legal abortion is the absence of trained providers. Our goals are to build a network of support and resources for students and residents, to reform medical curricula and training to include abortion and reproductive health as a standard part of medical education, to increase reproductive health education and training opportunities for medical students and residents, and to advocate integrating abortion into medical training and practice by educating policymakers in medicine and government. We work on a grassroots basis at medical schools and residency programs throughout North America, sponsor national and regional educational meetings, provide reproductive health clinical training externships, maintain a presence on the Internet, and publish a quarterly newsletter.

The National Association of Women Lawyers (NAWL) is a one hundred year old bar association headquartered in Chicago. It was the first and is the oldest national women's bar association in the United States. NAWL's missions include preventing violence against women and achieving reproductive rights and economic justice for women. NAWL remains committed to ensuring that all women have safe and unobstructed access to health providers, without being subjected to unreasonable search or seizure.

The National Center for the Pro-Choice Majority is a nonprofit organization that provides research and information services to the pro-choice movement. It publishes a national newsletter, *The Pro-Choice Report*, which informs its subscribers about the numerous challenges to women's reproductive freedom which can prevent them from exercising their constitutional right to make and carry out reproductive decisions. The drug testing of pregnant women is an example of one such challenge.

The National Network of Abortion Funds (NNAF) created in 1993, is an association of 73 community-based abortion funds in the United States, including one in the state of South Carolina. In 1999 NNAF member funds helped approximately 10,000 women who would not have been able to obtain a safe, legal abortion with their own resources, by loaning or granting them a combined total of over $1.2 million. Restrictions on abortion access and funding are discriminatory because they especially burden poor women, young women, women of color and rural women. NNAF believes that involuntary drug testing of pregnant women is a violation of privacy which strikes the most vulnerable women -- those whose reproductive choices are already severely limited by government policies such as abortion-funding cutoffs and welfare child-exclusion laws.

The National Society of Genetic Counselors (NGSC), an organization comprised of 1800 individual members, is

the leading authority and advocate for the genetic counseling profession. The NSGC supports an increase in prevention efforts and treatment services for alcohol and drug-dependent women and their children. Treatment services have proven to be a successful way to overcome both drug and alcohol abuse and thus prevent prenatal exposure to these agents. These services are far preferable to punitive sanctions brought against alcoholic and drug-dependent women solely because they were pregnant when they used alcohol or drugs.

The Northwest Women's Law Center (NWLC) is a non-profit public interest organization that works to advance the legal rights of all women through litigation, education, legislation and the provision of legal information and referral services. Since its founding in 1978, the NWLC has been dedicated to protecting and expanding women's reproductive rights, and has long focused on the threats to women's access to care. The NWLC has also challenged efforts by prosecutors to bring criminal charges of child abuse against women who use controlled substances while pregnant, successfully fought anti-choice initiatives, and challenged efforts to force sterilizations on developmentally disabled women. The NWLC continues to serve as a regional expert and leading advocate on reproductive freedom.

The South Carolina Coalition Against Domestic Violence and Sexual Assault (SCCADVASA) is a strong voice for women's rights in South Carolina. SCCADVASA is a private, nonprofit statewide advocacy organization founded in 1981 to represent the needs of victims/survivors of domestic and sexual violence. SCCADVASA believes that the drug-testing policy adopted by law enforcement officials in Charleston, South Carolina in 1989 is a serious infringement on women's rights. As such it is absolutely unacceptable to this organization and we wholeheartedly volunteer our participation as *amicus curiae* in this case.

The South Dakota Coalition Against Domestic Violence and Sexual Assault (SDCADVSA) is a nonprofit organization of twenty-three local domestic violence/sexual assault programs dedicated to ending domestic violence. SDCADVSA provides services such as crisis phone counseling and temporary shelter for battered women and their children, and promotes public acknowledgment of the problems of domestic violence and sexual assault. SDCADVSA holds that oppression of every kind promotes and encourages domestic violence and believes that attempts to create rights for the fetus at the expense of the liberty of the mother are a form of oppression which cannot be condoned by our organization.

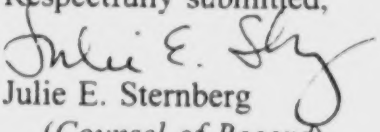
The Women's Law Center of Maryland, Inc. (WLC) was established in 1971 to meet the legal needs of women especially in the area of family law and in the workplace. Through impact litigation, legislative initiatives, direct service projects, and public education, the WLC works to eliminate discrimination and unfair practices for women in the state of Maryland. The WLC's membership includes approximately 200 women and men from all walks of life, including lawyers, business executives, elected officials, policy makers, artists, journalists, students, engineers, homemakers, and health-care professionals. The WLC is concerned that *Ferguson v. City of Charleston* presents significant issues concerning the basic constitutional rights of women, specifically pregnant women. We believe that the application of the special needs exception to pregnant women will open the door to unlimited restrictions on a woman's right to privacy.

Wider Opportunities for Women (WOW) is a national nonprofit women's employment organization with over three decades of experience helping women and girls achieve equality of opportunity in education and employment. WOW's mission is to help low-income women and their children achieve economic self-sufficiency and to move out of poverty. WOW is concerned with ensuring that women

have gender equality because the lack of such equality fundamentally and negatively impacts women's ability to attain economic independence.

For the reasons stated above, *amici* respectfully seek leave to file the attached brief *amicus curiae*.

Respectfully submitted,



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INTEREST OF *AMICI* [1]

The interest of *amici* are set forth in the accompanying motion.

STATEMENT OF THE CASE

Petitioners in this case are ten women who were each subjected to warrantless, suspicionless, and nonconsensual urine testing for cocaine use by the Medical University of South Carolina (MUSC), a state hospital, in connection with their pregnancies. Because they tested positive for cocaine use, nine of the women, all of whom were African-American, were arrested for cocaine possession, distribution of cocaine to a minor, or child abuse. The tenth petitioner was compelled to admit herself "voluntarily" to the MUSC psychiatric unit for substance abuse treatment for a month in order to avoid arrest.

The policy at issue was developed in the fall of 1989 by a joint interagency task force that included representatives from the office of the local prosecuting attorney and the Charleston police department, as well as MUSC. Pursuant to the policy, any MUSC maternity patient who met one or more of nine generalized criteria was subject to a urine drug screen. The criteria were: (1) no prenatal care; (2) late prenatal care (beginning after 24 weeks); (3) incomplete prenatal care (fewer than five visits); (4) preterm labor without an obvious cause; (5) separation of the placenta from the uterine wall; (6) a history of drug or alcohol abuse; (7) unex-

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[1] Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

plained birth defects; (8) intrauterine growth retardation without an obvious cause; or (9) intrauterine fetal death. This protocol undoubtedly resulted in the testing of dozens of pregnant women whose urine contained no trace of controlled substances, although MUSC's failure to keep records of its implementation of the policy makes that number impossible to quantify. *See* McCabe Tr.165:15-20, 177:6-17.

Under the policy as originally implemented, a patient whose urine tested positive for cocaine was reported to law enforcement and arrested. Later, the policy was amended so that a woman who had a single positive test for cocaine could choose to receive drug treatment or be arrested; however, a second positive test or failure to comply with drug treatment obligations would result in notification to authorities and her arrest. Thirty women were arrested pursuant to the MUSC policy, all but one or two of whom were African-American. *See* Shapiro Tr.187:15-17. Many women at MUSC were arrested during their pregnancies or immediately following delivery.

Petitioners brought this lawsuit against MUSC and other state defendants to challenge MUSC's policy of warrantless, suspicionless, and nonconsensual urine testing of pregnant women as a violation of, *inter alia*, their rights under the Fourth and Fourteenth Amendments to be free from unreasonable searches and seizures. The court of appeals upheld the MUSC drug tests as reasonable "special needs" searches under the Fourth Amendment.

SUMMARY OF ARGUMENT

The question in this case is whether the Fourth Amendment permits the state, acting without either a warrant or individualized suspicion, to compel pregnant women who seek prenatal care in a public hospital to submit to a drug test. Respondents urge this Court to hold that MUSC's mandatory drug testing policy meets the "special needs" exception to Fourth Amendment requirements. To fit within the special needs exception, however, the state must establish both that its policy is unrelated to normal law enforcement needs and that the persons being searched have a diminished expectation of privacy. Here, respondents can establish neither. The integral involvement of law enforcement officials in the planning and execution of the challenged policy is fully discussed in other briefs. This brief is therefore focused on rebutting the claim that pregnant women have a diminished expectation of privacy, and thus diminished Fourth Amendment rights, merely by virtue of their pregnancy.

Respondents defend that claim in this case by pointing to the state's interest in protecting the health of pregnant women and the fetuses they carry. There is nothing new about these proposed justifications for treating women as less than fully autonomous and denying them rights routinely granted to men. Indeed, this Court not only acknowledged but endorsed such reasoning at an earlier stage of our history when women were commonly barred by law from participating in the nation's social, political, and economic life. But, as this Court recently observed, those decisions relegating women to a lesser constitutional status were written "when a different understanding . . . of the Constitution prevailed." *Planned Parenthood v. Casey*, 505 U.S. 833, 896 (1992). Just as this Court has refused to give husbands dominion over their wives for the purpose of enabling them to assert an interest in the fetus, *id.* at 898, so this Court

must prevent the state itself from exercising such dominion over pregnant women. Indeed, over the past several decades, this Court has repeatedly and forcefully rejected attempts to deny women equality, even in the face of benign assurances that the challenged actions were necessary to protect maternal and fetal health. *See, e.g., International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974).

As the Court has further recognized, once that justification is accepted as the basis for stripping rights away, there is no logical stopping point. Many things men and women do before and after conception can affect the health of future children, from smoking to drinking to bad dietary habits. If the state can drug test pregnant women based on criteria that have more to do with poverty than with actual drug use, there is no reason why the state could not claim an equivalent right to disregard constitutional constraints and monitor the behavior of women more generally throughout their pregnancies. Nor is this concern fanciful. In recent years, for example, pregnant women in this country have been forced to undergo cesarean sections without their consent and been imprisoned for alcohol use, all in the name of protecting fetal health.

Such intrusions by the state necessarily rest on the paternalistic assumption that the constitutional rights of pregnant women can be overridden whenever the state purports to be acting in furtherance of fetal health. This assumption is legally insupportable. And, as this case once again demonstrates, it is an assumption that results more often than not in policies that have a disproportionate impact on poor and minority women, thereby most heavily burdening those women whose personal and physical autonomy is already most threatened by the state.

ARGUMENT

I. ONLY PERSONS WITH A DIMINISHED EXPECTATION OF PRIVACY MAY BE SUBJECTED TO WARRANTLESS, SUSPICIONLESS, NONCONSENSUAL SEARCHES UNDER THE SPECIAL NEEDS DOCTRINE

The Fourth Amendment protects the people against "unreasonable searches and seizures." Searches performed without a warrant are generally unreasonable *per se*, unless they fit within a carefully defined exception to the warrant requirement. *See, e.g., Schneckloth v. Bustamante*, 412 U.S. 218, 219 (1973). Even in contexts where a warrant is not required, to be reasonable under the Fourth Amendment a search ordinarily must be based on individualized suspicion of wrongdoing. *See Chandler v. Miller*, 520 U.S. 305, 308 (1997); *see also Vernonia School District v. Acton*, 515 U.S. 646, 671 (1995)(O'Connor, J., dissenting)("'while the plain language of the Amendment does not mandate individualized suspicion as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures'")(quoting Clancy, "The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures," 25 Mem. St. U.L. Rev. 483, 489 (1994)).

The collection and testing of urine from maternity patients at MUSC constitutes a search subject to the Fourth and Fourteenth Amendments. *See Chandler*, 520 U.S. 305; *Acton*, 515 U.S. 646; *National Treasury Employees Union v. Von Raab (NTEU)*, 489 U.S. 656 (1989): *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989). "As explained in *Skinner*, government-ordered 'collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable.'" *Chandler*, 520

U.S. at 313 (quoting *Skinner*, 489 U.S. at 617). Moreover, contrary to the conclusion of the court below, *Ferguson v. City of Charleston, South Carolina*, 186 F.3d 469, 479 (1999)("searches at issue here . . . were only minimally intrusive"), such urine testing is a severe intrusion on personal privacy. Indeed, at least four Justices of this Court have recognized that "state-compelled, state-monitored collection and testing of urine . . . is . . . 'particularly destructive of privacy and offensive to personal dignity.'" *Acton*, 515 U.S. at 672 (O'Connor, J., dissenting, joined by Stevens and Souter, JJ.)(quoting *NTEU*, 489 U.S. at 680 (Scalia, J., dissenting)).

The searches at issue in this case were not based on individualized suspicion. Although respondents have argued that the "criteria for performing the test . . . provided amble [sic] suspicion to believe that the patients had been using cocaine," Op.Cert. at 23, few if any of the factors in the MUSC policy are closely associated with cocaine use. The fact that a pregnant woman misses prenatal visits, has a prior history of alcohol abuse, or experiences medical difficulties during pregnancy does not provide any reasonable basis to believe that she may have ingested cocaine during her pregnancy. In fact, a number of the criteria are far more indicative of poverty than of cocaine use; poor women often lack ready access to prenatal care and suffer from health and nutritional deficiencies that may have adverse consequences for their pregnancies. *See, e.g.*, J.A. at 286-87 (Chasnoff). A claim of individualized suspicion cannot, therefore, rest on a patient's satisfaction of any one of the criteria that triggers testing under the MUSC policy.

This Court has recognized only a few narrow exceptions to the individualized suspicion requirement, based on "special needs, beyond the normal need for law enforcement." *Chandler*, 520 U.S. at 313; *Skinner*, 489 U.S. at 619. Even then, the Court has upheld a "special needs"

search only when the Court concluded that the person subjected to a suspicionless search possessed a "diminished expectation of privacy." *See Acton*, 515 U.S. at 657 ("school athletes have a reduced expectation of privacy"); *NTEU*, 489 U.S. at 679 (customs employees seeking promotions to positions involving drug interdiction or firearms use "enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions"); *Skinner*, 489 U.S. at 627 ("the expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety"); *New York v. Burger*, 482 U.S. 691, 700 (1987)("expectation of privacy . . . is particularly attenuated in commercial property employed in 'closely regulated' industries"); *see also Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978)("certain industries have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise")(citation omitted); *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985)(Powell, J., concurring)("students within the school environment have a lesser expectation of privacy than members of the population generally").

In particular, the Court has upheld suspicionless searches of certain classes of people over whom the state has supervisory or custodial authority, such as pretrial detainees, probationers, and public school students. *See Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979)(pretrial detainees); *Griffin v. Wisconsin*, 483 U.S. 868 (1987)(probationer); *Acton*, 515 U.S. 646 (public school athletes). Such a supervisory relationship, this Court has held, justifies "a degree of impingement upon privacy that would not be constitutional if applied to the public at large." *Griffin*, 483 U.S. at 875; *cf. Acton*, 515 U.S. at 655 ("the nature of [the State's] power is custodial and tutelary, permitting a degree of su-

pervision and control that could not be exercised over free adults").

As discussed more fully below, pregnant women clearly cannot be placed in the same category.

II. PREGNANT WOMEN DO NOT, BY VIRTUE OF THEIR PREGNANCIES, HAVE A DIMINISHED EXPECTATION OF PRIVACY

In order to uphold the MUSC drug testing policy, this Court would have to determine that pregnant women, by virtue of their pregnancies, have a diminished expectation of privacy; that, like prisoners, parolees, and schoolchildren, they are not entitled to the full protection afforded free adults by the Fourth Amendment. This Court's recent jurisprudence leads to the opposite conclusion: pregnant women have as great a right to privacy as other free adults, as well as to autonomy and bodily integrity. Unlike its relationship to public school students, the state does not stand *in loco parentis* to pregnant women. Unlike prisoners, probationers, and detainees, pregnant women have not sacrificed their right to privacy. Because women do not in any sense become wards of the state by virtue of their pregnancies, the state cannot subject pregnant women to warrantless, suspicionless, nonconsensual searches.

In *Planned Parenthood v. Casey*, 505 U.S. 833, 887-98 (1992), the Court struck down a Pennsylvania statutory provision that required a married woman to notify her husband before having an abortion. *See also Planned Parenthood v. Danforth*, 428 U.S. 52, 69 (1976)(spousal consent requirement for abortion held unconstitutional). The Court recognized that a husband has a "deep and proper concern and interest" in the fetus his wife is carrying. *Casey*, 505 U.S. at 895. Nevertheless, the Court ruled that the husband's interest did not "outweigh[] a wife's liberty"

and did not permit the state to regulate her pregnancy to protect his interest. *Id.* at 898.

Of particular relevance here, the Court recognized the slippery slope that a contrary ruling would have created:

> If a husband's interest in the potential life of the child outweighs a wife's liberty, the State could require a married woman to notify her husband before she uses a post-fertilization contraceptive. Perhaps next in line would be a statute requiring pregnant married women to notify their husbands before engaging in conduct causing risks to the fetus. After all, if the husband's interest in the fetus' safety is a sufficient predicate for state regulation, the State could reasonably conclude that pregnant wives should notify their husbands before drinking alcohol or smoking. Perhaps married women should notify their husbands before using contraceptives or before undergoing any type of surgery that may have complications affecting the husband's interest in his wife's reproductive organs. And if a husband's interest justifies notice in any of these cases, one might reasonably argue that it justifies exactly what the *Danforth* Court held it did not justify -- a requirement of the husband's consent as well.

Id. Thus, the Court concluded: "A State may not give to a man the kind of dominion over his wife that parents exercise over their children." *Id.*

A fortiori, the state may not itself exercise the kind of dominion over pregnant women that parents exercise over their children. Yet, application of the special needs exception in this case would reduce the legal status of pregnant women to less than full adults. Any purported justification

for excepting pregnant women from the Fourth Amendment's general protection against unreasonable searches must ultimately rest on an outmoded view of women as mere incubators of the fetus and mothers to their children, subjecting women, on that basis, to otherwise unconstitutional intrusions into their privacy.

This traditional view of women's "proper" role has long been used in a variety of contexts to deny women full participation in the social and economic life of the country, as well as equal status under the Constitution. As this Court recognized in *International Union, UAW v. Johnson Controls*, 499 U.S. at 211, "[c]oncern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities." For example, this Court relied on that "concern" in *Muller v. Oregon*, 208 U.S. 412, 422 (1908), when it upheld a maximum hours law intended to protect a woman's "proper discharge of her maternal functions":

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Id. at 421.

This concern for women's role in "the preservation of the race" was also cited by the Court as a valid basis for exempting women from poll taxes, on the assumption that the "burdens necessarily borne by them" as mothers prevented them from earning a living. *Breedlove v. Suttles*, 302 U.S. 277, 282 (1937). Similarly, during the American Medical Association's nineteenth century campaign to outlaw abortions, anti-abortion advocates argued that childbearing was "a duty tacitly promised the state." D.H., "On Producing Abortion: A Physician's Reply to the Solicitations of a Married Woman to Produce a Miscarriage for Her," 17 Nashville J. Med. & Surgery 200, 201 (1876). *See generally* Reva Siegel, "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection," 44 Stan. L. Rev. 261, 280-323 (1992). During the same time period, women were excluded from higher education out of concern that "the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs." *United States v. Virginia*, 518 U.S. 515, 536 n.9 (1996).[2]

But, as this Court recently observed in *Casey*, those arguments were advanced at a time "when a different understanding of . . . the Constitution prevailed." 505 U.S. at 896. That "different understanding" is most famously encapsulated by Justice Bradley's concurring opinion in *Brad-*

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[2] Respondents here articulate similarly paternalistic purposes behind the MUSC policy. *E.g.*, Op.Cert. at 2 (MUSC has a "special interest in protecting the health of pregnant patients"), 1 ("drug screens were medically necessary for management of pregnancy patients"). Like other paternalistic rationales, this one cannot withstand scrutiny. The MUSC policy is punitive, not therapeutic, resting as it does on both the threat and the reality of arrest and imprisonment of noncompliant patients. A therapeutic policy cannot depend on coercion, for competent individuals in this society have the right to accept or reject medical interventions. *E.g.*, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

well v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873), where he offered the following rationale for the exclusion of Myra Bradwell from the practice of law:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong or should belong, to the family institution, is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

Justice Bradley then concluded: "The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother." *Id.*

By contrast, the *Casey* Court unequivocally rejected the notion that women have "special responsibilities" as "the center of home and family life" that "preclude[] full and independent legal status under the Constitution." 505 U.S. at 897 (quoting with disapproval *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)(upholding Florida's effective exclusion of women from jury service)); *see also Frontiero v. Richardson*, 411 U.S. 677, 684 (1973)(acknowledging "our Nation['s] . . . long and unfortunate history of sex discrimination . . . rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage"). Similarly, in *Johnson Controls*, 499 U.S. 187, this Court unanimously invalidated an employment policy that barred fertile women, but not fertile men, from certain work

in a battery plant because of the risk of lead exposure. In so doing, this Court implicitly repudiated the paternalistic rationales for women's subordination that had animated decisions such as *Muller v. Oregon*, 208 U.S. 412. As both *Casey* and *Johnson Controls* make clear, even "professed moral and ethical concerns about the welfare of the next generation do not suffice" to justify reducing the legal status of women to less than full adults. *Johnson Controls*, 499 U.S. at 206; *see also Casey*, 505 U.S. at 896-98; *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (invalidating public school policy that required pregnant teachers to leave work barely halfway through their pregnancies).

As the *Casey* Court further emphasized: "The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed for the supposed benefit of a member of the individual's family." 505 U.S. at 898. The MUSC drug-testing policy subjects pregnant women to just such an "abuse of governmental power . . . for the supposed benefit of a [prospective] member of the individual's family." It seeks to trump women's liberty with the state's interest in the health of the fetus. The policy thereby ignores this Court's rulings affirming the equal rights of pregnant women to autonomy, bodily integrity, and privacy. For this reason it cannot be sustained.

III. AN AFFIRMANCE BY THIS COURT WOULD OPEN THE DOOR TO EXTENSIVE RESTRICTIONS ON INDIVIDUAL AUTONOMY AND PRIVACY RIGHTS

This Court should also decline to apply the special needs exception in this case because doing so would pave the way for virtually boundless impingements on individual autonomy and privacy rights guaranteed by the Constitution.

This Court has refused in other contexts to allow the infringement of constitutional rights on the basis of a proffered state interest that has no logical stopping point, "thus allowing the exception to swallow the rule." *Florida v. J.L.*, __ U.S. __, No. 98-1993, slip op. at 6 (March 28, 2000) (footnote omitted)(refusing to recognize a firearms exception to the Fourth Amendment's insistence on reliable tips). The Court should likewise decline to do so here.

Allowing the diminution of constitutional protections in the name of the fetus could subject pregnant women to restrictions on virtually every aspect of their lives, including the most private aspects. For generations, a wide range of common conditions of and activities by pregnant women has been identified, rightly or wrongly, as posing some threat to their health and that of the fetus. Although the specific directives given to pregnant women have changed over time, the pervasive scope of the conduct that they address has not.

Thus, one generation ago, pregnant women were directed to modify everything from their smoking habits to their bathing and sexual habits. For instance, one popular pregnancy guide encouraged women to limit their smoking to ten cigarettes or fewer per day. Nicholson Eastman, M.D., EXPECTANT MOTHERHOOD 78 (3d ed. 1957). If, however, they had "been used to smoking considerably more than this for several years," then they were told "by no means to try to give them up during pregnancy," as doing so would be too upsetting. *Id.* Alcohol consumption was to be limited to "a cocktail now and then." *Id.* at 66. Baths during the later stages of pregnancy were forbidden because of the fear (later proved unfounded) of infection from bath water, among other reasons. *See id.* at 71; Arlene Eisenberg, *et al.*, WHAT TO EXPECT WHEN YOU'RE EXPECTING 249 (2d ed. 1996). Fetal welfare and that of pregnant women further mandated, as an "extremely important and absolute" rule, that "[u]nder no circumstances" could preg-

nant women engage in sexual intercourse during the last month of pregnancy. Eastman, *supra*, at 73. Pregnant women's diet was likewise strictly regulated: They were told to eat "no more and no less" than they had eaten before they became pregnant, *id.* at 46; to limit salt intake drastically, *id.* at 65; and to gain between 20 and 24 pounds, *id.* at 67.

Today, the range of behavioral guidelines urged on pregnant women in the name of fetal health is as broad if not broader. For example, to ensure optimal fetal development, pregnant women are now urged to stop smoking entirely and immediately, *see* Eisenberg, *et al.*, *supra*, at 54-57; American College of Obstetricians and Gynecologists, PLANNING FOR PREGNANCY, BIRTH, AND BEYOND 108-09 (2d ed. 1995)(hereinafter ACOG); to avoid contact with anyone who is smoking and who could thereby subject the fetus to contamination from second-hand smoke, Eisenberg, *et al.*, *supra*, at 57-58; and to abstain from alcohol consumption, "except perhaps for a celebratory half glass of wine on a birthday or anniversary," *id.* at 53; *see also* ACOG, *supra*, at 110-112. In the name of fetal safety, pregnant women are further urged to refrain from changing a cat litter box, consuming unpasteurized cheese or undercooked meat, and gardening without gloves in order to avoid contracting toxoplasmosis, Eisenberg, *et al.*, *supra*, at 64; to have microwave ovens checked for radiation leakage because of "talk that [the microwave] may be a modern menace," *id.* at 65; and to wear rubber gloves and avoid inhaling when using household cleaning products in order to limit exposure to potentially harmful chemicals, *id.* at 67-68. Pregnant women are also advised to ensure that their drinking water is free of lead, *id.* at 68, and to cut back on or give up caffeine, *id.* at 60; ACOG, *supra*, at 109-110. Gaining no less than 25, and no more than 35 pounds, is now encouraged, ACOG, *supra*, at 124; Eisenberg, *et al.*,

supra, at 148, as is regular but not too strenuous exercise, Eisenberg, *et al.*, *supra*, at 189-90; ACOG, *supra*, at 88-90. Pregnant women with certain medical histories are told to limit or avoid having sexual intercourse at all during pregnancy, ACOG, *supra*, at 104-05; and some physicians urge the use of condoms for all couples during the last eight weeks of pregnancy, Eisenberg, *et al.*, *supra*, at 250.

The directives given to pregnant women thus touch on virtually every aspect of their lives. Many of these directives may be salutary; if history is prologue, others may prove to be misguided. But, in either event, there is a critical constitutional distinction between medical advice that rests on the premise of patient autonomy, and state-coerced supervision that overrides individual autonomy in favor of government paternalism. Under respondents' proposed formulation of the special needs exception, what is to prevent the state from requiring blood alcohol level tests of pregnant women at every prenatal visit? Why could the state not require blood tests to measure nicotine and caffeine levels?[3] What is to stop the police from undertaking surveillance of pregnant women to ensure that they are making regular prenatal visits to an obstetrician, eating properly, taking appropriate precautions when using household cleaning products and changing the cat litter, and exercising enough but not too much? Why could the police not conduct warrantless searches of the homes of pregnant women to assess whether drinking water is being filtered? What about surveillance of

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[3] It is difficult to ascertain the relative risks to the fetus of various discouraged behaviors. As discussed more fully in the *amicus* brief of American Public Health Association, *et al.*, medical studies have not validated the assumption, underlying the MUSC policy, that prenatal exposure to cocaine poses risks of long-term, negative effects on child development that are different in degree from the risks posed by exposure to other maternal behavior, whether legal or illegal. *See id.* at Part III (citing studies).

the bedrooms of pregnant women to ensure that couples are following a physician's direction to abstain from sexual intercourse, or searches for condoms when their use has been directed? And what is to stop the police from placing under hospital or other detention those pregnant women whose failure to follow the rules is deemed a threat to the fetus? As this Court has recognized, the Constitution does not allow state action that opens the door to such a troubling degree of intrusion on the rights of pregnant women. *See* Point II, *supra*.[4]

It is by no means purely theoretical to assume that the state would attempt such measures. An array of incidents and policies evidences the willingness of state authorities to disregard the constitutional rights of pregnant women when

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[4] Moreover, there is no logical stopping point preventing similar impositions on all sexually active men and women with reproductive capacity. For example, recent epidemiological studies trace diverse forms of fetal injuries to sperm damaged by, *inter alia*, exposure to alcohol, lead, and pesticides, *see, e.g.*, Siegel, *supra*, at 337; and both paternal drug use and paternal smoking have been linked to certain birth defects, *see* Cynthia R. Daniels, "Fathers, Mothers, and Fetal Harm: Rethinking Gender Difference and Reproductive Responsibility," *in* FETAL SUBJECTS, FEMINIST POSITIONS 83, 85-88 (Lynn M. Morgan & Meredith W. Michaels eds., 1999)(citing studies). Furthermore, because a woman's conduct has the greatest impact on fetal development during the first several weeks of pregnancy, when a history of irregular menstrual cycles or bleeding caused by hormonal changes may obscure from the woman the fact of her pregnancy, the state might consider regular, mandatory pregnancy testing for all sexually active women. *See, e.g.*, Dawn E. Johnsen, "The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights to Liberty, Privacy, and Equal Protection," 95 Yale L.J. 599, 625 n.82 (1986). Thus, suspicionless searches of all sexually active men and women with reproductive capacity could be justified by the assertion of a "special need" to protect fetal health.

their behavior is deemed unsuitable to fetal development. Fortunately, in many such cases the invasive measures undertaken by state authorities have ultimately been rescinded by other officials or rejected by the courts; unfortunately, for practical reasons the reversals have often come too late to prevent unwarranted suffering and deprivation of rights.

In one line of cases, state authorities have seized and detained, or threatened to seize and detain, pregnant women in the name of protecting the fetus. Officials in the South Carolina Department of Alcohol and Other Drug Abuse Services, for example, recently distributed literature advising pregnant women that "it's . . . a crime in South Carolina" to "smoke, drink . . . or engage in other activities that risk harming" the fetus. South Carolina Department of Alcohol and Other Drug Abuse Services, "Important Facts to Remember: A Special Delivery Should be Handled With Care." Only after the state Attorney General -- in the midst of the briefing for this Court in this case -- learned of that message were the brochures hastily recalled and statements made by the Attorney General to the press that only pregnant women who use illegal drugs would be prosecuted. *See, e.g.*, "Agency Pulls Pregnancy Pamphlets: Brochures Recalled for Inaccurate Statements About Legality of Substance Abuse," Augusta Chron., May 14, 2000, at B2. The official from the Department of Alcohol and Other Drug Abuse Services who is responsible for redrafting the recalled literature has indicated, however, that he "has not decided whether to make reference to nicotine or alcohol abuse as potentially criminal" in the next edition of the brochures. *Id.* Moreover, at least one South Carolina woman has been arrested for consuming alcohol during her pregnancy. *See* Lynn M. Paltrow, "Pregnant Drug Users: Fetal Persons, and the Threat to *Roe v. Wade*," 62 Alb. L. Rev. 999, 1055 n.273 (1999)(citation omitted).

Wyoming officials have likewise arrested a pregnant woman because of alcohol use and charged her with felony child abuse. Rachel Roth, MAKING WOMEN PAY: THE HIDDEN COSTS OF FETAL RIGHTS 150 (2000)(citing Charles Levendosky, "Turning Women into Two-Legged Petri Dishes," Star-Tribune, Jan. 21, 1990, at A8; Charles Levendosky, "Using the Law to Make Justice the Victim," Star-Tribune, Feb. 4, 1990, at A8). She spent time in jail before a judge dismissed the charge. *Id.* And alcohol use is not the only ground cited for detaining pregnant women. In Wisconsin, for example, officials held a pregnant sixteen-year-old in secure detention for the sake of fetal development because the young woman tended "to be on the run" and to "lack motivation or ability to seek medical care." Veronika E. B. Kolder, M.D., *et al.*, "Court-Ordered Obstetrical Interventions," 316 New Eng. J. Med. 1192, 1195 (1987)(citing "Girl Detained to Protect Fetus," Wis. State J., Aug. 16, 1985, at 3.2).

These incidents are not unique. In California, a deputy district attorney, concerned about a pregnant woman's mental state but lacking sufficient evidence to have her committed for psychiatric treatment, instead obtained a juvenile court order declaring her fetus a dependent child of the state and detaining the woman pending birth. *In re Steven S.*, 126 Cal. App. 3d 23, 30-31 (Cal. Ct. App. 1981). The appellate court ultimately held that the district attorney had impermissibly manipulated the juvenile laws to detain a woman who, by all accounts, could not properly be committed under the applicable code. *Id.* at 30-31. By the time the appellate court issued its ruling, however, the woman had already been involuntarily detained for approximately two months until the delivery of her child, at which point she was released. *Id.* at 27, 31. Similarly, in New York, state officials sought to detain a pregnant woman in a mental hospital against her will on the sole ground that, if re-

leased, she would resume drug use and thereby pose a danger to her fetus. *In re the Retention of Tanya P.*, No. 530059/93, slip op. at 2-4 (N.Y. Sup. Ct. Feb. 24, 1995). The court rejected the state's petition, ordered the woman released, and, in a subsequently issued written decision, emphasized that the "right to determine one's medical treatment and to make reproductive choices is, and must be, superior to any interest which the state may have in an unborn fetus." *Id.* at 6, 26. Several weeks after her release, the woman gave birth to a healthy and drug-free baby. *Id.* at 1.

In other cases, state authorities have sought to compel pregnant women to submit to surgery in the name of promoting fetal health. In Massachusetts, for example, a lower court ordered a pregnant woman's cervix sewn up against her will to prevent a possible miscarriage. *See Taft v. Taft*, 446 N.E. 2d 395, 396 (Mass. 1983). The woman was ultimately spared from undergoing the procedure by the Supreme Court of Massachusetts, which vacated the lower court's order because that court had not adequately considered the woman's constitutional right of privacy, *id.* at 396-97, and because the record did not show "circumstances so compelling as to justify curtailing [her] constitutional rights," *id.* at 397. In Michigan, a court ordered a pregnant woman who refused on religious grounds to undergo a cesarean section to report to the hospital or be forcibly brought there by the police. *See* Janet Gallagher, "Prenatal Invasions and Interventions: What's Wrong with Fetal Rights," 10 Harv. Women's L.J. 9, 47 (1987)(citing Flanigan, "Fleeing the Law: A Matter of Faith," Det. Free Press, June 29, 1982, at 3A). Rather than submit to the police, the woman fled into hiding with her family and about two weeks later gave birth vaginally, with no complications, to a healthy baby. *Id.* In a similar case in Illinois, a pregnant woman was advised that, because of an insufficient flow of oxygen to the fetus, the fetus could be born dead or severely

retarded if she did not immediately undergo a cesarean. *In re Baby Doe*, 632 N.E.2d 326, 327 (Ill. App. Ct. 1994). When the woman opposed the surgery on religious grounds, the office of the State's Attorney sought a court order compelling her to submit to the cesarean. *Id.* That request was denied, and the Illinois appellate court ultimately issued a decision affirming that a woman's "right to refuse invasive medical treatment, derived from her rights to privacy, bodily integrity, and religious liberty, is not diminished during pregnancy." *Id.* at 332. After the order was denied, the woman gave birth by vaginal delivery to an "apparently normal and healthy, although somewhat underweight, baby boy." *Id.* at 329.

Other women have been unable to avoid compelled cesarean sections, notwithstanding the attendant risks.[5] One young pregnant woman, severely ill with cancer, several times mouthed the words "I don't want it done" when told that a court had ordered her to undergo a cesarean and that she likely would not survive the operation. *In re A.C.*, 573 A.2d 1235, 1241 (D.C. 1990)(*en banc*). The cesarean was nonetheless performed; the baby died within a few hours of the surgery; and the woman died two days later. *Id.* An *en banc* panel of the District of Columbia Court of Appeals

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[5] Because a cesarean section is major surgery, it carries with it higher rates of maternal mortality and morbidity than vaginal delivery. *See, e.g.*, Nancy K. Rhoden, "The Judge in the Delivery Room: The Emergence of Court-Ordered Cesareans," 74 Cal. L. Rev. 1951, 1958 (1986). Post-operative infections, including infections of the endometrium, urinary tract, or surgical wound, are of particular concern, and occur five to ten times more often after cesarean section than after vaginal birth. *See id.* Other risks include "trauma to nearby organs (*e.g.*, uterus, bladder, bowel), pulmonary embolus, delayed wound healing, hernia, bowel obstruction, and hemorrhage." *Id.*

later reviewed the case notwithstanding mootness concerns, vacated the court order, and held that "in virtually all cases the question of what is to be done is to be decided by the patient -- the pregnant woman -- on behalf of herself and the fetus." *Id.* at 1237. It further held that if the pregnant woman's condition prevented her from clearly giving informed consent, the court must ascertain what her decision would have been through a substituted judgment procedure. *Id.*

Finally, because poor and minority women are more likely to give birth at public institutions and have more contact with state agencies, they are most often the targets of the draconian measures attempted by state officials. *See, e.g.*, Roth, *supra*, at 91, 147. One study of forced cesarean section cases, for example, found that eighty-one percent of the women involved were African-American, Asian, or Hispanic. Kolder, *et al.*, *supra*, at 1193. Likewise, the vast majority of women subjected to sterilization abuse in past decades were members of minority groups. *See* Dorothy E. Roberts, "Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy," 104 Harv. L. Rev. 1419, 1442-43 (1991). The record in this case reveals similar racial bias. *See, e.g.*, J.A. at 287-91, 315-16 (Chasnoff); *id.* at 1192-93 (Williams). Thus, a decision by this Court allowing the diminution of constitutional protections for pregnant women will most severely impact those women whose personal and physical autonomy is already most threatened by the state.

CONCLUSION

For the reasons stated above, this Court should reverse the judgment of the United States Court of Appeals for the Fourth Circuit permitting the state to undertake warrantless, suspicionless, nonconsensual urine testing of pregnant women.

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